Counsel appearing on following page

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

v.

FELIX P. CAMACHO, *et al.*,

Respondents.

Civil Case No. 04-00006

CHARMAINE R. TORRES, *et al.*,

Plaintiffs,

v.

GOVERNMENT OF GUAM, *et al.*,

Defendants.

Civil Case No. 04-00038

MARY GRACE SIMPAO, *et al*,

Plaintiffs,

v.

GOVERNMENT OF GUAM,

Defendant,

v.

FELIX P. CAMACHO, Governor of Guam

Intervenor-Defendant.

Civil Case No. 04-00049

SIMPAO PLAINTIFFS' SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO THE COURT'S ORDER OF DECEMBER 7, 2006

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COME NOW Plaintiffs Mary Grace Simpao, Christina Naputi and Janice Cruz, hereinafter "*Simpao* Plaintiffs," by and through counsel Van de veld Shimizu Canto & Fisher and Tousley Brain Stephens PLLC, to submit this Brief pursuant to this Court's Order filed December 7, 2006.

Before the Court are several pleadings related to the *Santos* and *Torres* plaintiffs' motion for preliminary approval of a proposed settlement. The Court has scheduled a hearing on the preliminary approval of the class action settlement and requested supplemental briefing on four issues. In its December 7, 2006 Order, this Court requested briefing on the following issues: 1) whether the Court lacks jurisdiction over those taxpayers included in the proposed settlement class whom have never filed a tax return; 2) whether the statute of limitations of 26 U.S.C. § 6532 is commenced by the Guam Form 1040 tax forms containing the language that the Earned Income Credit (EIC) is inapplicable to Guam, and if so, whether this statute of limitations is waivable; 3) whether parties oppose this Court discussing with the mediator whether the Simpao plaintiffs were given a "meaningful opportunity" to participate in settlement negotiations; and 4) the Court's concern about an immediate payout to 1997 and 1998 class members under the proposed settlement. The *Simpao* Plaintiffs respond as follows.

I. LANGUAGE FOUND ON GUAM TAX FORM 1040 CANNOT LEGALLY COMMENCE 26 U.S.C. § 6532 STATUTE OF LIMITATIONS.

Title 26 U.S.C. § 6532 states in relevant part:

"(a) Suits by taxpayers for refund -- (1) General rule. -- No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, **nor after the expiration**

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of 2 years <u>from the date of mailing by certified mail or registered mail</u> by the Secretary to the taxpayer <u>of a notice of a disallowance</u> of the part of the claim to which the suit or proceeding relates." (emphasis added).

The Court poses the question of whether the language the Government placed on the Guam Tax Form 1040 stating that the EIC is "inapplicable" to Guam serves as an adequate substitute for the requirement of 26 U.S.C. § 6532 that the Government mail a notice of disallowance to each affected taxpayer in order to commence a two-year statute of limitation for a tax refund suit. *Simpao* plaintiffs submit that controlling law resoundingly answers this question in the negative for several reasons: 1) 26 U.S.C. § 6532 is a jurisdictional statute which may not be expanded beyond its plain language by either the Court or the Executive Branch; 2) Federal case law interpreting 26 U.S.C. § 6532 mandates the mailing of a disallowance notice is necessary to the operation of the statute; 3) this statute explicitly requires taxpayer's written waiver to forego the mailing of a disallowance notice; and 4) the language printed on a tax form in no way reasonably constitutes a formal or adequate notice of disallowance to any singularly affected taxpayer, especially in the absence of any specific analysis and determination by the Government of any individual taxpayer's refund claim.

A. <u>26 U.S.C. § 6532 Is A Jurisdictional Statute Which Must Be Strictly Construed And May Not Be Circumvented by Courts or Executive Officials</u>.

Title 26 U.S.C. § 6532 was enacted by Congress as a specific waiver of sovereign immunity to suit, making it a statute of limitations that is jurisdictional in nature. *Oatman v. Dept. of Treasury*, 34 F.3d 787, 789 (9th Cir. 1994) ("The district court lacks jurisdiction over claims for refunds … [that] have not satisfied the procedural requirements of <u>26 U.S.C. §§ 6532</u> and <u>7422</u>."); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990) ("the prerequisites to suit described in <u>section 6532</u>'s 'general rule' are jurisdictional"). Accordingly,

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the U.S. Supreme Court demands the language of the statute be strictly observed by courts. *United States v. Dalm*, 494 U.S. 596, 608, 110 S.Ct. 1361 (1990) ("[A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended."). Put another way, "the task of an appellate court in such cases is … determining technical application of the law consistent with the well-established view that tax laws are technical and, for the most part, are to be accordingly interpreted." *Webb v. United States*, 66 F.3d 691, 694 (4th Cir. 1995). The plain language of Section 6532(a) states the two-year statute of limitations commences upon the Government mailing a disallowance notice to the taxpayer by registered or certified mail. This did not occur in the instant case and thus the two-year limitation period was never commenced. This Court is prohibited from departing from the strict instruction of this jurisdictional statute requiring registered or certified mailing of a disallowance notice, to instead accept as substitute some surrogate language on the tax form which was never mailed to a single affected taxpayer. "A statute's plain meaning should be conclusive unless it creates an inconsistent or incoherent statutory scheme 'at odds with the intentions of its drafters.'" *Oatman*, 34 F.3d at 788 (internal citation omitted).

Similarly, the Government is bound by the jurisdictional nature of Section 6532 to conform to its language, thus it may not disregard the mailing of a disallowance notice and yet still initiate a two-year statute of limitation on suit. "While the IRS has the ability to waive its own regulatory requirements and consider a claim that is not in the proper form, it is powerless to waive the statutory requirements set forth by Congress, including the statute of limitations." *Wertz v. United States*, 51 Fed.Cl. 443, 448 (2002); see *United States v. Garbutt Oil Co.*, 302

U.S. 528, 533-34, 58 S.Ct. 320 (1938) ("The opinion expressly recognized [is] that no officer of the government has the power to waive the statute of limitations ...").

Neither this Court nor the Government may deviate from the specific language of the statute requiring mailing of disallowance notices in order to invoke a two-year limitation on suit. Section 6532 is a jurisdictional statute enacted by Congress to set a condition which, if invoked by the mailing of a notice of disallowance, compels the filing of a suit upon this occurrence. If this precondition never occurs, as it has not here, then the two-year statute of limitation is not commenced.

B. Mailing of Notice of Disallowance Is Necessary to Operation of 26 U.S.C. §6532.

Several federal courts confirm that Congress intended the government actually mail a notice of disallowance in order for the purpose of 26 U.S.C. § 6532 to be fulfilled. Numerous decisions on this subject repeatedly uphold the premise that the literal mailing of a notice of disallowance to the taxpayer is vital to the operation of the statute. Congress itself re-emphasized this mailing requirement by enhancing the method of mailing notice and adding certified mail to the existing registered mail requirement, when it amended this statute in 1958 (Pub. L. 85-866).

The Eleventh Circuit Court of Appeals applied Congress' express intent within Section 6532 that it is vital to the statute that notice be mailed, in a case that interprets this principle as superior to whether the taxpayer actually received the notice which was mailed. *Rosser v. United States*, 9 F.3d 1519 (11th Cir. 1993). Prefacing that the court was bound to rely upon the plain meaning of the statutory language of Sec. 6532(a)(1), the court held: "The only reasonable interpretation of this language is that the statutory period for bringing suit begins to run from the date that the IRS mails, by certified or registered mail, a notice of disallowance to the taxpayer".

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9 F.3d at 1522. The court noted that previously it was difficult to ascertain with certainty when the statute of limitations began to run, until Congress amended the Internal Revenue Code in 1932 to "provide a definite date that triggered the statute of limitations for a tax refund suit. *Id.* The court looked to the Senate Report on the amendment, which states "the bill requires the mailing of a notice of disallowance by registered mail" and concluded the purpose consistent through legislative history of Section 6532 was to eliminate uncertainty about the statute of limitations and "mandating that the statutory period begin to run in every case from the date of mailing a disallowance notice." *Id.*

The Second Circuit Court of Appeals holds that "the two-year period for commencing [tax refund] suit starts to run when the commissioner mails notice of disallowance to the taxpayer. That is the moment when the taxpayer's cause of action accrues." *Einson-Freeman Co., Inc. v. Corwin*, 112 F.2d 683, 684 (2d Cir. 1940); see also *Maiman v. I.R.S.*, 1998 WL 161003, *2 (E.D.N.Y.) ("It is the mailing of a notice of disallowance, by certified or registered mail, that triggers the running of the two-year statute of limitations.").

The United States Court of Claims holds that a form of communication of disallowance other than mailing, a notifying phone call in that case, did not commence the statute of limitation for filing suit in comparison to the disallowance notice mailed to the taxpayer. *Looney v. United States*, 228 Ct.Cl. 807 (1981), 1981 WL 11173. The court further found this would constitute an invalid attempt by a government tax official to contravene the statutory mandate and lies outside the scope of his authority as circumscribed by the statute he or she is legally obligated to execute without exception. *Id.* at *2.

The Fifth Circuit Court of Appeals noted "the specific command of the [§6532] statute that the two year permissive period dates from the mailing of the notice of disallowance to the

taxpayer," and held that "No officer or employee of the United States is authorized to waive or vary the requirements of the statute." *Gallion v. United States*, 389 F.2d 522, 524 (5th Cir. 1968) citing *Finn v. United States*, 123 U.S. 227, 8 S.Ct. 82 (1887). In fact, Subsection (4) of 26 U.S.C. § 6532(a) states: "Reconsideration after mailing of notice. -- Any consideration, reconsideration, or action by the Secretary [of the Treasury] with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may begin." Thus the statute itself additionally prohibits the government from altering the requirements of this limitation provision.

Case law interpreting Congress' intent behind 26 U.S.C. § 6532 is clear: the mailing of a notice of disallowance is the condition whose occurrence is necessary to trigger the commencement of a two-year limitation period, after which a tax refund suit may no longer be filed. The Internal Revenue Service issued a Revenue Ruling exactly on point which states:

> It is held that, in the absence of a waiver filed by the taxpayer of the requirement that he be mailed a registered notice of disallowance, **a notification letter rejecting the taxpayer's claim, not sent by registered mail, will not invoke the two-year period of filing suit,**
>
> **and such period does not commence until action is taken by the Secretary or his delegate in the form of a notice of disallowance of a claim by registered mail.**
>
> **Since the period of limitations for filing suit does not commence in such a case,** agreement Forms 907, Agreement to Suspend Running of Statute of Limitations, to extend such period are not necessary. See Consolidated Edison Company of New York v. United States, 135 Fed.Supp. 881; Detroit Trust Company v. United States, 130 Fed.Supp. 815.
>
> Rev. Rul. 56-381, 1956-2 C.B. 953.

Thus in the present case, the statute of limitation under 26 U.S.C. § 6532 was simply never engaged by the Government to require suit be filed two years from some date certain. The

statute was arguably engaged for the purpose of accrual of time for filing of suit, that is, where taxpayers must have waited 6 months from the time the claim was disallowed before filing, but the limitation period for when suit could no longer be filed was never initiated by the Government.

C. Only Written Waiver by Taxpayer May Excuse Mailing of Disallowance Notice.

Yet another reason why the government may not avoid mailing a notice of disallowance to initiate the two-year statute of limitations can be found in 26 U.S.C. § 6532 itself. Subsection (3) of 26 U.S.C. § 6532(a) states: "Waiver of notice of disallowance. -- If a person files a written waiver of the requirement that he be mailed a notice of disallowance, the 2-year period prescribed in paragraph (1) shall begin on the date such waiver is filed." This particular provision demonstrates the statute's primacy for the notice to actually be mailed by the Government to ensure minimally sufficient notice is attempted, since the only legal authorization to bypass this statutory mandate would require a written waiver by each affected taxpayer.

In fact, the act of mailing the notice of disallowance is so crucial that it does not even matter if the taxpayer did not receive the notice, as long as it was mailed, which also avoids convoluted disputes over whether the taxpayer truly received the notice. *Rosser v. United States*, 9 3d. 1519, 1523 (11th Cir. 1993) ("Based on the plain language of the statute, its legislative history, and practical considerations, we hold that the two-year statute of limitations laid out in 26 U.S.C. § 6532(a)(1) begins to run in every case on the date the IRS mails the taxpayer a notice of disallowance, whether or not the taxpayer actually receives the notice.").

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D. The Government of Guam Did Not "Deny" EIC Claims For Purposes of 26 U.S.C. §6532(a)(1).

In view of the legal authority given above, it cannot be said with any reasonableness that the language printed on the Guam Tax Form 1040 satisfies the elements of a "notice of disallowance" required by the Internal Revenue Code, regardless of mailing. The language on the Guam tax form does not say "your claim has been disallowed," or "your claim has been reviewed and is hereby denied," it says that EIC is generally "not available," regardless of whether taxpayer is even attempting to claim an EIC amount on the form. Hence, the taxpayer's individual claim is never looked at or specifically adjudged by the government to somehow transform the language on the form into a notice to that taxpayer that his/her individual claim has been specifically disallowed.

Additionally, if the language on the Guam tax form is deemed a "notice of disallowance," then when does the statute of limitation actually begin running? Would it be at the printing of form; at the first day of availability of form; at the signing and filing of form by taxpayer? If so, then why would the clock begin to tick at any one of these occurrences as opposed to another? This creates a dangerous slippery slope for trying to determine when the statute of limitation commences because there is no guidance for what constitutes "notice" to the taxpayer, thus no certainty for when the statutes starts to run. Surely it cannot be the date the claim is filed because the taxpayer is made aware of the language when he or she completes the form beforehand. Does the language of "not available" inform the taxpayer that, when it may become available, he or she will be eventually compensated for a prior year? In this vein, the Government began accepting EIC claims in 1997 and 1998. Did that event give "notice" that their 1995 and 1996 claims may now be paid? Does the Guam Supreme Court EIC opinion of 2001 at that point inform taxpayers they have a legitimate entitlement equating "inevitable

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discovery" which then invokes the statute of limitation? Or does Executive Order 2005-01 invoke the statute of limitation because it announces EIC will be paid? As the Eleventh Circuit points out, this is exactly why Congress amended 26 U.S.C. § 6532 to avoid these problems and establish a firm date for the commencement of the statute of limitation by requiring a mailing of the disallowance notice. *Rosser v. United States, supra*, 9 F.3d 1519 (11th Cir. 1993)

In this context, it is equally important for the Court to remember that the general refusal to pay EIC was a blanket government policy enacted in 1996 which continued uninterrupted, except for 1997 and 1998, when the Government maintains that money was specifically appropriated by the Legislature for this purpose. Therefore, would this mean that all taxpayers had their right to sue elapsed for all years after 1998 because the language on the 1996 form and every form thereafter (save for 1997 and 1998) is a notice of disallowance, so they can never file suit at all? If instead the court looks to the first interrupted period of general refusal beginning in 1998, would this mean that no one could ever file a suit to recover EIC that should have been paid in 2001, 2002, 2003 or 2004 because a general policy was declared in 1998 that the EIC would no longer be paid henceforth? This is a ludicrous result which forecloses any time limit, thus any ability, to sue. Ultimately, the language on the tax forms was not an evaluation conducted every year of individual EIC claims. This was a policy pronouncement echoed on a form for years to come without any individual claim determination being made. This is just another reason why the language printed on the tax forms can in no way be reasonably construed as an adequate substitute for a formal notice of disallowance delivered to an individual affected taxpayer after an assessment was made of his or her specific claim.

Finally, what if taxpayer utilizes Federal Form 1040 for filing on Guam (which the Department of Revenue and Taxation as a rule accepts) that does not contain the language in

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question? Does this create a separate subclass of claimants who are unaffected by the statute of limitations because they are never deemed to have "received" a notice of disallowance communicated by the Guam tax form's language? The logical answer is "no" because this example helps prove the language on the Guam forms cannot constitute a formal "notice of disallowance" since it is impossible to ascertain if and when the notice is received by the taxpayer. Quite simply, the language at issue is no more than an obliteration of the ability to report the amount of the claim, and it cannot be said with any confidence to be a disallowance as intended by the IRC, especially since the language does not personally analyze and determine individual claims.

E. Other Relvant Case Law.

In a rather different factual circumstance, where a taxpayer sought to recover a cash bond deposited with the IRS to stop the running of interest and penalties for payroll tax liability, the District Court of New Jersey found that if the specific limitation statute of 26 U.S.C. § 6532 is not invoked by occurrence of mailing of notice to the taxpayer, then the general limitation statute of 28 U.S.C. § 2401(a) calling for 6 years for any civil suit against the Government would apply. *Finkelstein v. United States*, 943 F.Supp. 425 (D. N.J. 1996). However, the holding of *Finkelstein* is distinguishable because in that case the disallowance notice was actually mailed, and the court stated the actual mailing of the notice was not at issue because the taxpayer admitted receiving the notice. *Id.* at 430. Consequently, the court rejected taxpayer's claim, posing hypothetically that, if the Government had instead failed to mail the disallowance notice by registered or certified mail, taxpayer exceeded the 28 U.S.C. §2401 six-year statute of limitation anyway. *Id.* at 432. This case only reaffirms the importance of mailing the disallowance notice, citing the *Rosser* case (9 F.3d 1519) to argue that, once it is undisputed the

taxpayer received the notice, and the date of receipt is undisputed (both differing from the case at bar), it does not matter if the notice was mailed registered or certified, as long as it was mailed. *Id.* at 430.

Standing in stark opposition to *Finkelstein* is *Detroit Trust Co. v. United States*, wherein the U.S. Court of Claims found that, because the Commissioner of Internal Revenue never gave the taxpayer notice of claim rejection by registered mail, the taxpayer complied with the specific statute of limitation of 1939 IRC § 3772 (transformed today into 26 U.S.C. § 6532) and the six-year general statute of limitation did not apply. 130 F.Supp. 815, 817-18 (Ct.Cl. 1955); see *Klein Bancorporation, Inc. v. Comm'r of Revenue*, 581 N.W.2d 863, 867-68 (Minn. Ct. App. 1998) (analogizing to 26 U.S.C. §6532 and following *Detroit Trust*). The *Detroit Trust* court stated that because the specific limitation statute set out the terms and conditions under which the government could be sued in this specific tax refund action context, the more general statute of limitations is not applicable. *Id.* at 817. Another case converse to *Finkelstein* is *Consolidated Edison Co. of New York v. United States*, 135 F.Supp. 881 (Ct.Cl. 1955). In that case, the U.S. Court of Claims affirmed its holding in *Detroit Trust* and reiterated that the specific statute of limitation of 1939 IRC § 3772 (what is codified today as 26 U.S.C. § 6532) must apply and the same general six-year limitation statute on suit does not apply. *Id.* at 883.

The only other case that notably cites *Finkelstein* appears to be *Goss v. United States*, 293 F.Supp.2d 816 (N.D. Ohio 2003), yet this case is inapposite because the taxpayer was mailed a letter by the IRS and it involves a refund check that was mailed but never received by the taxpayer. Also, the court analyzes a different statute of limitations: 31 U.S.C. § 3702(c). Again using a hypothetical approach, the court viewed 28 U.S.C. § 2401(a) before looking to the specific statute of limitations to find the taxpayer would have failed this statute as well. *Id.*

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Despite these two cases, it is doubtful that 28 U.S.C. § 2401(a) can be considered organically compatible to the Guam Territorial Income Tax authored by Congress in the Organic Act and therefore is to be rejected as inapplicable per 48 U.S.C. § 1421i(d)(1). The section does not lie within the Internal Revenue Code that the Guam Tax mirrors by Congressional mandate. The section applies to all suits against the United States sovereign, and could not have been intended by Congress when forging the GTIT in the Organic Act to apply to tax refund suits against the locality of the government of Guam which has its own general statutes of limitation for suits against itself as a distinct sovereign. Finally, the two decisions discussed above lack congruence to the case at bar, both generally and in aspects already mentioned. It is noteworthy to remember the nature of the Government of Guam's bad faith in denying refunds and imagine the injustice created if the Government can exploit its own fundamentally wrong acts to the further injury of the Guam EIC taxpayer class by depriving them of any legal recourse whatsoever.

The *Goss* case is significant, however, because it defines when a taxpayer is put on "notice" to file suit, which by analogy defeats the notion that the Guam taxpayers were given "notice" of their right to sue upon filing their tax returns containing the language at issue. Even in light of 28 U.S.C. § 2401(a), the court noted a claim accrues "when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue" for their [EIC] refunds. 293 F.Supp.2d at 818. Applying this to the present case, the Government of Guam arguably denied liability, but no event occurred to legally "fix" its liability to compel Guam taxpayers until the year 2001 when the Guam Supreme Court issued *In Request Of I Mina' Bente Sing'ko Na Liheslaturan Guahan Relative To The Application Of The Earned Income Tax Credit Program To Guam Taxpayers ("The EIC question")* (2001 Guam 3) to find that EIC applies to Guam. The adjudication of this question to fix or determine the Government's liability

presents a more reasonable form of adequate notice to the taxpayer to commence a limitation period, as only then they received notice of their enforceable right and their legal "entitlement" to sue.

Furthermore, the 1995 and 1996 class year members did not see events which fixed the Government's liability but instead saw claims accepted in 1997 and 1998. Arguably, at the most these taxpayers were only then first put on "notice" that the EIC now applies to Guam and that they should demand payment and sue to recover their refunds. At the very extreme, *Goss* might show 1995 and 1996 class year members can be considered noticed or advised in 1997 that their prior claims have been disallowed to commence the statute of limitation.

II. COURT LACKS JURISDICTION OVER CLAIMS OF CLASS MEMBERS WHO HAVE NOT FILED A TAX RETURN.

Simpao Plaintiffs share this Court's concern that the proposed settlement class includes those who may have been"eligible" to receive EIC yet never filed a tax return for the years for which they would receive EIC refunds. This class definition is impermissibly broad and this Court must deny preliminary approval because it lacks jurisdiction to entertain the subject matter of the proposed settlement. *Simpao* Plaintiffs raised this concern in pages 13-18 of their *Plaintiff's Opposition To Governor Of Guam's Motion To Stay*, filed October 12, 2005 in Civil Case No. 04-00049, and in pages 16-19 of their *Supplemental Filing In Opposition To Preliminary Approval Of Class Action Settlement*, filed August 11, 2006 in the consolidated action. As *Simpao* Plaintiffs have already thoroughly briefed this issue in the aforementioned pleadings, the Court is asked to refer to those filings and only a brief summary of them will be offered for the present pleading.

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Title 26 U.S.C. § 7422(a) plainly states that no suit shall be maintained in any court for the recovery of any tax until a claim for refund or credit has been duly filed with the taxing authority. This is a jurisdictional prerequisite to filing an action for the recovery of taxes paid, meaning that if the taxpayer has not exhausted this administrative requirement, the court lacks subject matter jurisdiction over the suit and it must be dismissed. *Imperial Plan, Inc. v. United States*, 95 F.3d 25, 26 (9th Cir. 1996); *Quarty v. United States*, 170 F.3d 961, 971-73 (9th Cir. 1999). The settling parties bear the burden of showing the proposed settlement affords jurisdiction to this Court, which they have in fact failed to do. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673 (1994). Section 7422(a) is a jurisdictional statute of limitations, which means it may not be waived by the Government, whether by settlement agreement or otherwise. *Rosenbluth Trading, Inc. v. United States*, 736 F.2d 43, 47 (2d Cir. 1984). A properly executed income tax return constitutes a claim for refund or credit satisfying 26 U.S.C. § 7422(a). *Sorenson v. Sec. of Treas.*, 752 F.2d 1433, 1439 (9th Cir. 1985).

By failing to offer a class that complies with 26 U.S.C. § 7422(a), the settlement is further fatally defective because the class thereby fails to satisfy the requirements of 26 U.S.C. § 6511 as well. Section 6511 (requiring a claim be filed within 3 years of a return or within 2 years from the payment of the tax, whichever expires later) is also a jurisdictional prerequisite to maintaining a tax refund suit and the Court must dismiss any suit that has not pled or proved subject matter jurisdiction under this provision. *U.S. v. Dalm*, 494 U.S. 596, 110 S.Ct. 1361 (1990); *Zeier v. United States*, 80 F.3d 1360 (9th Cir. 1996). Just like Section 7422(a), Section 6511 may not be waived by the Government nor the courts. *Wertz v. United States*, 51 Fed.Cl. 443, 448 (2002). If no claim is alleged to have been made per Section 7422(a), then no claim is

made within 3 years of a return or within 2 years from the payment of the tax either, and Section 6511 remains unfulfilled.

The *Simpao* Plaintiffs have not only defined their class as having filed tax returns, but they have secured a summary judgment from this Court confirming that those tax returns filed by the putative class satisfy the jurisdictional requirement of 26 U.S.C. § 7422(a). Because this Court found that the tax returns filed by the *Simpao* Plaintiffs' putative class constitute claims under Section 7422(a), the Court granted summary judgment that those claims were timely filed, equally satisfying the jurisdictional requirement of 26 U.S.C. § 6511. The proposed settlement class fails to be comprised of anyone who has exhausted administrative remedies to lend this Court jurisdiction over the matter. Moreover, the Government is prohibited from waiving 26 U.S.C. §§ 6511 and 7422(a) in a settlement agreement or any context, as sovereign immunity may not be waived by any executive officer but only by strict congressional enactment. *Presidential Gardens Associates v. United States*, 175 F.3d 132, 140 (2d Cir. 1999); see *Overhauser v. United States*, 45 F.3d. 1085, 1088 (7th Cir. 1995); *U.S. v. Garbutt Oil Co.*, 302 U.S. 528, 534, 58 S.Ct. 320 (1938).

Therefore, this Court must disapprove at the preliminary stage the proposed settlement since the validity of an order for preliminary approval depends upon the subject matter jurisdiction of this Court. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701, 102 S.Ct. 2099 (1982) ("[T]he rule … is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction … where such jurisdiction does not affirmatively appear in the record."). No federal court has the authority to approve a settlement that contains or embraces illegality (see *Isby v. Bayh*, 75 F.3d 559, 565 (6th Cir. 2001), and this Court should disapprove the proposed settlement as facially injudiciable for

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failure of jurisdictional requirements (see *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977). Both sections 26 U.S.C. §§ 6511 and 7422(a) are waivers of sovereign immunity that may not be extended by the Court. *Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811 (1983).

III. IMMEDIATE PAYOUTS UNDER THE AGREEMENT ARE COERCIVE AND IMPROPER.

Simpao Plaintiffs also share this Court's concern regarding the proposed settlement's intent to make payments to class years 1997 and 1998 before it can be granted or denied final approval by this Court. Besides the potential waste of public funds by the Government if approval of this settlement is denied, which the Court points out (as well as the potential violation of the Guam Illegal Expenditures Act), *Simpao* Plaintiffs submit, as done previously at pages 29-30 of the *Supplemental Filing In Opposition To Preliminary Approval Of Class Action Settlement*, that the payout of claims before the settlement is approved is inherently coercive upon the EIC class and sinister in nature. The language of the proposed settlement unabashedly states: "acceptance of such payment shall cause them to have released their right to opt-out of this Settlement Agreement" if the agreement is granted final approval. *Settlement Agreement*, pp. 25 (1998) and 26-27 (1997). Nothing could be more insidiously coercive to cause EIC class members to knuckle under and accept lesser amounts than they might otherwise receive for all possible tax years, than by hurriedly putting an actual check in their hands for one or two of those years. On top of that, the class members in question will receive this check and unwittingly cash it before receiving the class-wide notice required to inform them of the specifics of the entire agreement. The Government benefits by ensuring the conscription of many through the exploitation of an understandably compelling urge of some of Guam's poorest taxpayers to

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cash a check instead of the Government obtaining fully informed consent or at least a signature on a form first. Instead, the Government unfairly capitalizes on the ignorance of the class members who are not yet afforded the education of class notice as to what they are really getting themselves into.

IV. COURT CONTACT WITH THE MEDIATOR.

The *Simpao* Plaintiffs have no objection to this Court contacting Judge William Cahill regarding the events of the mediation that took place in April 2006.

Respectfully submitted this 15th day of December, 2006.

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TABLE OF AUTHORITIES

Cases

Statutes

Other authority

CERTIFICATE OF SERVICE

I, JAMES L. CANTO II, certify that I caused a copy of the foregoing document here filed to be served on the following individuals or entities on December 15, 2006, via hand delivery at the following addresses:

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